81-2312

No.

Office - Supreme Court, U.S.
FILED
JUL 9 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

HERSCHEL H. FRIDAY
B. S. CLARK
The First National Building,
Twentieth Floor
Little Rock, Arkansas 72201
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTION PRESENTED FOR REVIEW

Whether the "active interference" exception to the enforceability of a "no damages for delay" contract clause requires a finding that the act constituting interference was done in bad faith.

LIST OF PARTIES

Petitioner is Missouri Pacific Railroad Company, the defendant in the district court. Respondent is United States Steel Corporation, the plaintiff in the district court.

TABLE OF CONTENTS

	Page
I. Question Presented	i
II. List of Parties	i
III. Table of Authorities	iv
IV. Opinions Below	1
V. Jurisdiction	1
VI. Statement of the Case	2
VII. Reasons for Granting the Writ	4
I. The Eighth Circuit erred in finding active interference absent the requisite finding of bad faith.	4
II. Clarification will permit complex and expensive contract litigation to be avoided.	6
VIII. Conclusion	7
IX. Appendix	A-1

TABLE OF AUTHORITIES

A. Kaplan & Son, Ltd. v. Housing Authority, 42 N.J. Super. 230, 126 A.2d 13 (1956) 6

American Bridge Co. v. State, 245 App.Div. 535, 283 N.Y.S. 577 (1935) 4

Anthony P. Miller, Inc. v. Wilmington Housing Authorty, 165 F.Supp. 275 (D.Del. 1958) 4,5,6

Garofano Construction Co. v. State, 183 Misc. 1080, 52 N.Y.S.2d 186 (1944) 4

Gasparini Excavating Co. v. Penn. Turnpike Comm'n., 409 Pa. 465, 187 A.2d 157 (1963) 4

Peter Kiewit Sons' Co. v. Iowa Southern Utilities Co., 355 F.Supp. 376 (S.D. Iowa 1973)..... 4,5

Wells Brothers Co. v. United States, 254 U.S. 83 (1920). 5,6

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

VS.

UNITED STATES STEEL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals, not yet reported, appears in the Appendix herein. The order denying petitioner's petition for rehearing is set forth in the Appendix. The bifurcated proceeding in District Court for the Eastern District of Arkansas resulted in two unreported opinions, both of which appear in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 14, 1982. A timely petition for rehearing *en banc* was denied on March 12, 1982, and this petition for certiorari was filed within 90 days of that date.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1) and seeks reversal of the opinion below. Review on certiorari is warranted because the issue raised is an important one which significantly affects a great number of persons and clarification would permit complex and expensive contract litigation to be avoided.

STATEMENT OF THE CASE

This diversity case arose from a contract dispute between the parties. The Missouri Pacific Railroad Company (MoPac) contracted with United States Steel Corporation (U. S. Steel) for alteration of the superstructure of two railroad bridges which spanned the Arkansas River at Little Rock, Arkansas. After the substructure contractor began work, MoPac issued a notice to proceed to U. S. Steel. The substructure contractor did not complete its work as scheduled, causing U. S. Steel to be delayed 150 days. U. S. Steel filed a claim with MoPac contending that it should be paid for damages caused by the delay. The claim was denied and this lawsuit was brought.

MoPac based its defense on the "no damages for delay" contract clause which read:

> Failure of the substructure contractor to complete his work on a specified date or dates shall not form the basis for a claim for extra compensation by this superstructure contractor.

The district court agreed that this "no damage" provision placed the risk of the substructure contractor's delay on U. S. Steel (Appendix at A-20) but held that U. S. Steel was "nevertheless entitled to recover the costs of the 150-day delay because the active interference by MoPac in issuing the notice to proceed created an exception to the enforceability of the 'no damage' clause" (Appendix at A-20).

The district court found that active interference had occurred because "[w]hen in spite of its knowledge of likely delay[1] MoPac issued the notice to proceed, not merely mistake or negligence, but rather an affirmative act took place." Appendix at A-22. The district court did not find that MoPac acted in bad faith when it issued the notice to proceed or at any time during the course of dealing between the parties. The Eighth Circuit Court of Appeals affirmed the district court, despite holding that "active interference requires a finding that defendant committed some affirmative act in bad faith which unreasonably interfered with the contractor's compliance with the terms of the construction contract." Appendix at A-8.

---

[1] The parties dispute whether MoPac, at the time it issued the notice to proceed to U. S. Steel, had knowledge that the substructure contractor would likely not complete its work on schedule. Petitioner contends, however, that issuance of the notice to proceed even with such knowledge does not amount to active interference absent a finding that MoPac acted in bad faith.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit Erred In Finding Active Interference Absent The Requisite Finding Of Bad Faith.

The Eighth Circuit Court of Appeals correctly found: that the type of "no damage" clause contained in the contract between MoPac and U. S. Steel is valid and should generally be enforced according to its terms (Appendix at A-7); that delay caused by active interference is an exception to the enforceability of a no damage clause (Appendix at A-7); and that active interference *requires a finding* that defendant committed some affirmative, willful act *in bad faith* which unreasonably interfered with the contrator's compliance with the terms of the construction contract (Appendix at A-8). *See, Peter Kiewit Sons' Co.* v. *Iowa Southern Utilities Co.*, 355 F.Supp. 376, 396-401 (S.D. Iowa 1973); *Anthony P. Miller, Inc.* v. *Wilmington Housing Authority*, 165 F.Supp. 275, 280-83 (D. Del. 1958). It cannot be disputed that the district court did not find that MoPac acted in bad faith; yet the Eighth Circuit, despite enunciating a bad faith test, affirmed the district court's holding that MoPac was guilty of active interference.

This contortion of the law of active interference was brought about by the Eighth Circuit's reliance on the three state court cases which bear superficial similarity to the case at bar. Appendix at A-8; those cases are: *Gasparini Excavating Co.* v. *Pennsylvania Turnpike Comm'n.*, 409 Pa. 465, 187 A.2d 157 (1963); *Garofano Construction Co.* v. *State*, 183 Misc. 1080, 52 N.Y.S.2d 186 (1944); *American Bridge Co.* v. *State*, 245 App. Div. 535, 283 N.Y.S. 577 (1935). In none of those cases, however, did the issue of bad faith enter the court's analysis. If the Eighth Circuit had followed the bad faith test which it announced, the case would have been remanded for a specific finding on the bad faith question or, as dissenting Judge McMillian urged, reversed. Instead, the court based its ruling on analogy to

cases rendered inapposite by the fact that they were not decided under the rule of law (i.e. the bad faith test) announced by the court.

The law weighs heavily on the side of the test announced, rather than the test implemented, by the Eighth Circuit. In *Anthony P. Miller, Inc., supra,* 165 F.Supp. at 283, for example, the court refused to render summary judgment on the basis of a "no damage" clause but held that "unless the plaintiff at trial is able to adduce proof indicating that the delays charged were the product of fraud, evil intent, improper motive or willfulness amounting to bad faith, its case cannot survive a motion for directed verdict." A similarly strict test was applied in *Peter Kiewit Sons' Co., supra,* 355 F.Supp. 376. There the court made the following holding:

> It, therefore, would appear that to be guilty of "active interference" in the instant action, the defendants herein would have to have committed some affirmative willful act, in bad faith, to unreasonably interfere with plaintiff's compliance with the terms of construction contract.

355 F.Supp. at 399.

The presumption is obvious and strong that men who sign million-dollar construction contracts containing "no damage" clauses protected themselves against delays by the higher price exacted for their work. *Wells Brothers Co.* v. *United States,* 254 U.S. 83, 87 (1920). Such men are neither unsophisticated nor careless. *Id.* They should be bound by the terms of their agreement.

Because the court below announced one test and applied another, one thing is clear: both can't be right. Active interference either requires a finding of bad faith or it doesn't. To allow this internally conflicting decision to stand unreviewed is to exalt confusion over clarity. Since it is the only remedy af-

forded in our system for such error, it is respectfully urged that fundamental considerations of justice command the granting of review.

II. Clarification Will Permit Complex And Expensive Contract Litigation To Be Avoided.

"No damage" clauses are common in construction contracts, particularly those which relate to public improvements. *See, e.g., Wells Brothers Co.* v. *United States,* 254 U.S. 83 (1920); *Anthony P. Miller, Inc.* v. *Wilmington Housing Authority,* 165 F.Supp. 275, 281 (D. Del. 1958). Such clauses are "obviously conceived in the public interest in protecting public agencies contracting for large improvements on the basis of fixed appropriations or loan commitments against vexatious litigation based on claims, real or fancied, that the agency has been responsible for unreasonable delays." *Anthony P. Miller, Inc., supra,* 165 F.Supp. at 281, quoting *A. Kaplen & Son, Ltd.* v. *Housing Authority,* 42 N.J.Super. 230, 126 A.2d 13, 15 (1956). The ubiquity and the close relation to the public welfare of "no damage" clauses command clarification of the rights of contracting parties who agree to a "no damage" clause.

The decision of the court below casts doubt on the validity of "no damage" clauses. Although two experienced and sophisticated parties agreed to the clause and proceeded in good faith, the court simply read the clause out of the contract. To so erode the certainty of a time-tested and common contract provision is to invite unnecessary litigation—litigation which can be avoided if this Court grants review and affirms the enforceability of "no damage" clauses absent bad faith.

CONCLUSION

For the foregoing reasons it is submitted that the petition for certiorari should be granted to review the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

HERSCHEL H. FRIDAY and
B. S. CLARK
The First National Building,
Twentieth Floor
Little Rock, Arkansas 72201
501/376-2011

June 8, 1982.

APPENDIX

APPENDIX

Page

A. Opinion, *United States Steel Corp.* v. *Missouri Pacific Railroad Co.* (8th Cir. 1982) (the opinion of which review is sought) A-1

B. Memorandum and Order, *United States Steel Corp.* v. *Missouri Pacific Railroad Co.*, (E.D. Ark. 1980) (District Court opinion on liability) A-15

C. Memorandum on Damage Issues, *United States Steel Corp.* v. *Missouri Pacific Railroad Co.*, (E.D. Ark. 1980) A-36

D. Order Denying Rehearing, United States Court of Appeals for the Eighth Circuit, March 12, 1982 ... A-49

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80-1935

United States Steel Corporation,
Appellee,

v.

Missouri Pacific Railroad Company,
Appellant.

Appeal from the United States District Court for the Eastern District of Arkansas

---

Submitted: September 17, 1981

Filed: January 14, 1982

Before STEPHENSON and McMILLIAN, Circuit Judges, and HANSON,* Senior District Judge

---

* The Honorable William C. Hanson, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

HANSON, Senior District Judge.

We are asked to review in this diversity action the district court's application of the principle of "active interference" in resolving a dispute arising out of a contract between appellant, the Missouri Pacific Railroad (Mopac), the appellee, United States Steel. Mopac contracted with United States Steel's American Bridge Division (ABD) for alteration of the superstructure of two Mopac railroad bridges which spanned the Arkansas River at Little Rick, Arkansas. The work was necessitated by development of the Arkansas River as a navigable stream pursuant to an act of Congress. The initiation of ABD's field work was contingent upon the completion of certain work by the substructure contractor, Al Johnson Construction Co. Johnson encountered unforeseen obstacles which caused repeated revisions in its scheduled completion date. While ABD was contractually bound to apprise itself of Johnson's work progress and adjust its schedule accordingly, it was also bound to heed Mopac's notice to proceed and commence work when such notice was given. ABD commenced its work, suffering additional and unnecessary costs when its access to the construction site was delayed. U.S. Steel, on behalf of ABD, brought this action to recover these increased costs from Mopac.

Following a bench trial, the district court found that Mopac, by giving notice to proceed to ABD when it knew that delay of Johnson's work was inevitable, actively interfered with ABD's ability to maintain a flexible work schedule in the face of Johnson's difficulties; the result being that Mopac was liable for damages[1] suffered by ABD while it waited for 175 days past its

---

[1] The district court also found that Mopac was liable for damages to ABD for a further 71 days of delay which were directly attributable to Mopac. The finding of liability and the award of damages for these delays are not contested by Mopac on this appeal. We confine our discussion in this opinion to those circumstances relevant to the 150 days of delay for which the district court found Mopac liable under the theory of active interference.

original start-up date to gain access to the job site. Mopac concedes liability for 25 days of this delay, but argues on appeal that the contract's no damage for delay clause precludes recovery by ABD for the remaining 150 days, that the evidence is insufficient to support the district court's conclusion of active interference, and that certain aspects of the damage award were either not supported by the evidence or were improperly awarded. We affirm the lower court in all aspects.

I.

Mopac awarded ABD a contract to alter the superstructure of the Junction and Baring Cross Bridges on October 24, 1968. ABD could not begin its work until the substructure contractor, Johnson, completed work on the south pier of the Junction Bridge and constructed a "shoofly", which is a temporary bridge used to reroute rail traffic during construction. Johnson was under contract to complete this phase of its work within one year of receipt of notice to proceed, which was given by Mopac on August 6, 1968.

On November 22, 1968, Mopac issued a notice to proceed to ABD, which triggered the following provision in their contract:

> The contractor will be required to commence work under the contract within 10 calendar days after the date of receipt of Notice to Proceed, to prosecute and work with faithfulness and diligence so as to complete the entire work not later than the number of calendar days stipulated in Section 3 and the Proposal after date of receipt by the Contractor of written Notice to Proceed. Extension to the time allowed for completion may be granted pursuant only to the provisions set forth elsewhere in these Specifications.

As this clause and others in the contract indicated, time was of the essence to Mopac. Failure of ABD to respond to the notice

to proceed would constitute breach. In addition, the contract's liquidated damages clause made ABD liable for $600 in damages per day for every day its work exceeded the completion date. Consequently, when ABD received its notice, it began immediately to prepare shop drawings, place mill orders, begin steel fabrication, set dates for shipping equipment and materials, and prepare work schedules. ABD's first work schedule sent to Mopac indicated that it expected its start-up date for field work to be September 1, 1969. This date was based on the assumption that Johnson would complete its work as scheduled on August 6, 1969.

ABD's first indication that Johnson was encountering problems came when it made an on-site inspection on March 5, 1969, and discovered that Johnson was over three months behind schedule. Six days later Mopac's chief engineer wrote ABD, informing it that Johnson had pushed back its completion date from August 6 to November 2, 1969. Johnson was advised by Mopac that this delay would conflict with ABD's fabrication and erection schedule; nevertheless, ABD had no choice but to revise its schedule accordingly, setting a new start-up date at sometime in early November 1969.

On July 2, 1969, Mopac informed ABD that Johnson had again pushed back its completion date—it would complete the Junction Bridge pier work in mid-November, but the shoofly would not be completed until December 31, 1969. ABD again revised its schedule, anticipating access to the job site in the first week of January 1970. In July Mopac notified ABD that Johnson did not expect the shoofly to be completed until January 11, 1970; in August, Mopac told ABD that Johnson had pushed its completion date back another two weeks. ABD twice reset its start-up date to conform with these revisions.

ABD received no further word during the fall of 1969 about Johnson's work progress, but during an on-site visit on

December 15, 1969, ABD learned that the shoofly would probably not be completed until February 1, 1970. ABD promptly informed Mopac that it was too late for it to stop shipments of fabricated steel to the job site and that it would suffer extra expenses for the attendant demurrage, equipment rental, and overhead.

ABD's first steel shipment arrived at the job site on December 29, 1969, it moved onto the job site on January 5, 1970, and three days later Mopac disclosed that ABD could not start its work until the second week in February. ABD in fact was unable to commence work until February 23, 1970. The total delay from the originally scheduled start-up date of September 1, 1969, to February 23, 1970, was 175 days. Mopac informed ABD that the completion date for ABD's work would be adjusted 175 days thus relieving ABD from any claim for liquidated damages for failure to complete its work on schedule.

Requiring mention are the difficulties encountered by Johnson, which were the subject of a prior lawsuit. *Al Johnson Construction Co.* v. *Missouri Pacific Railroad Co.*, 426 F.Supp. 639 (E.D. Ark. 1976), *aff'd mem.*, 553 F.2d 103 (8th Cir. 1977). In that case Johnson sued Mopac for increased costs under the changed circumstances clause of their contract. The plans and specifications supplied by Mopac did not reveal, among other matters, that a rock ledge obstructed an area of the riverbed where the south pier was to be constructed for the Junction Bridge which forced Johnson to change to a different and more costly method of construction. Johnson also found steel in the riverbed (the remains of an old, collapsed bridge) at other places where piles were to be driven. Recovery by Johnson was permitted for the increased costs caused by these changed circumstances.

The district court in the court in the present case gave collateral estoppel effect to the fact findings of the *Johnson* case,

which are part of the record here. The court found that Mopac knew about the rock ledge and the steel in the riverbed before it issued the notice to proceed to ABD. It also found that Mopac should have known delay by Johnson was inevitable because of these unforeseen circumstances. Johnson would be forced to redesign and employ a different type of cofferdam[2] than originally planned, remove the rock ledge, and drive piles through steel at several different points. *See Johnson, supra,* 426 F.Supp. at 644. The district court also found that once notice was given by Mopac to ABD, a series of events of great momentum were set in motion by ABD in order to be prepared to start construction on September 1, 1969. The lower court observed that ABD did its best to adjust its work schedules according to updates it received on Johnson's progress (or lack of it), but additional expenses to some degree were unavoidable.[3] The court concluded that Mopac, by issuing the notice to proceed with knowledge of Johnson's delay-causing problems, actively interfered with ABD's ability to plan and execute its work in a timely and economically efficient fashion. Following a separate hearing on damages, the court awarded ABD $364,232 which included compensation for increased costs incurred both by Mopac's active interference and by other delays during construction directly attributable to Mopac (*see* note 1, *supra*).

---

[2] A cofferdam is a watertight temporary structure that has been pumped dry so that the bridge foundation may be constructed within it.

[3] We do not understand Mopac to challenge the finding that additional and unavoidable expenses indeed were incurred by ABD, although Mopac does challenge in certain particulars the amount of damages suffered and awarded. Mopac's main argument, in effect, is that while ABD may have suffered damages for delay, Mopac is not responsible for them.

II.

Mopac first argues that the following "no damage" clause in the contract precludes the award of damages to ABD for any delay caused by Johnson's untimely completion of its work: "Failure of the substructure contractor to complete his work on a specified date or dates shall not form a basis for claim for extra compensation by this superstructure contractor." Such no damage clauses, when clear and unambiguous, are regarded as valid and will be enforced according to their terms. *See Peter Kiewit Sons' Co.* v. *Iowa Southern Utilities Co.*, 355 F.Supp. 376, 396-97 (S.D. Iowa 1973) *and cases cited therein.* Indeed, the district court in this case upheld the validity of the no damage clause, concluding that Johnson's nonperformance "cannot serve as the predicate for damages from the railroad, it having expressly and unambiguously shifted the risk of such nonperformance to [ABD]." Mem. op. at 5.

What Mopac actually challenges is the lower court's application of the principle of active interference, a judicially recognized exception to the no damage clause, courts will strictly construe such provisions but generally enforce them absent delay (1) not contemplated by the parties under the provision, (2) amounting to an abandonment of the contract, (3) caused by bad faith, or (4) amounting to active interference. *Peter Kiewit Sons', supra,* 355 F.Supp. at 397; *see also E. C. Ernst, Inc.* v. *Manhattan Const. Co. of Texas,* 551 F.2d 1026, 1029 (5th Cir. 1977), *mod. on other grounds,* 559 F.2d 268 (5th Cir. 1977), *cert. denied,* 434 U.S. 1067 (1978).

The active interference exception arises from the notion that in a contract such as the one in the instant case—wherein time is of the essence, yet the contractee's liability for delay is limited through a no damage clause—there is implied an obligation on the part of the contractee to refrain from anything that would unreasonably interfere with the contractor's opportunity to pro-

ceed with its work in the manner provided by the contract and to permit the contractor to carry on that work with reasonable economy and dispatch. *Taylor-Fichter Steel Constr. Co.* v. *Niagara Frontier Bridge Com'n.*, 261 App.Div. 288, 25 N.Y.S.2d 437, 441 *aff'd without op.*, 287 N.Y. 669, 39 N.E.2d 290 (1941). Liability, however, is not created merely because of claimed interference caused by the delay of another contractor employed by defendant, *id.;* after all, this is precisely the type of liability which the no damage clause seeks to prevent. Nor is defendant liable for delay resulting from "a simple mistake, error in judgment, lack of total effort, or lack of complete diligence." *Peter Kiewit Sons', supra,* 355 F.Supp. at 399. As the name implies, active interference requires a finding that defendant committed some affirmative, willful act in bad faith which unreasonably interfered with the contractor's compliance with the terms of the construction contract. *Id.*

Courts have found active interference where the contractee, despite knowledge of delay-causing conditions, has issued notice to proceed to the contractor resulting in increased costs because of the contractor's premature initiation of its work. *Gasparini Excavating Co.* v. *Pennsylvania Turnpike Comm'n.*, 409 Pa. 465, 187 A.2d 157 (1963); *Garofano Construction Co.* v. *State,* 183 Misc. 1080, 52 N.Y.S.2d 186 (1944); *American Bridge Co.* v. *State,* 245 App.Div. 535, 283 N.Y.S. 577 (1935). In such a case the affirmative willful act is the issuance of the notice to proceed; the requisite bad faith is demonstrated by proof of the contractee's knowledge that delay-causing circumstances exist which will likely prevent the contractor from timely proceeding with its work.

The *American Bridge* case, *supra,* like the one before us, was a suit by a bridge superstructure contractor for damages caused when the contractee (the State of New York), with knowledge that the substructure contractor's work would be delayed, issued notice to proceed to American Bridge. American Bridge

had the steel for the superstructure fabricated, painted, and ready to erect 21 months before the substructure contractor finally completed its work. As a result, American Bridge suffered increased costs for storing the steel and repainting it after the paint began to deteriorate during storage. The court held that the state's order to proceed was an active interference with American Bridge's operations: "It was the state's order to continue preliminary work in the face of necessary stoppage and postponement of the work on the project itself, which constituted the interference and caused the damage. Not delay, but the requirement of unnecessary, premature, preliminary operations was the interference."

A nearly identical situation existed in this case. The lower court concluded,

> Until the notice to proceed was issued, ABD had free choice and complete flexibility to reschedule its orders and its work force. But it lost this freedom and flexibility when Mopac issued the notice to proceed on November 22, 1968, at a time when Johnson had already encountered the unexpected rock ledge, redesigned its cofferdam, and found steel in the river bed, all of which should have indicated to Mopac that adjustment in schedules would be necessary because of the inevitable delay these changes would bring in the completion of the substructure work. The notice to proceed had a coercive and restricting effect upon ABD by virtue of the provisions of the contract.

Mopac claims ABD created its own predicament by failing to fulfill its contractual duty to apprise itself of Johnson's progress and schedule its work accordingly. But as the district court observed, *supra*, ABD's ability to fulfill its duty was restricted by Mopac when it issued the notice to proceed. The contract provisions clearly put Mopac in the dominant position in determining when ABD should begin its work. Mopac exercised the advantage of this position when it issued notice. ABD was not

in a position to undertake the risk of noncompliance which could result in a finding of breach or, in the event of late performance, assessment of liquidated damages. We therefore adopt the reasoning of the lower court and hold that there was no error in its conclusion that Mopac's active interference created an exception to the enforceability of the no damage clause in the contract.

III.

Mopac alternatively argues that the evidence is insufficient to support the lower court's conclusion that Mopac actively interfered with ABD's operations. Mopac challenges the finding that steel was discovered in the riverbed before November 22, 1968, when the notice to proceed was given. The district court found that one of Mopac's on-site consulting engineers, Mr. Edwin Young, knew about the steel on October 30, 1968, almost a full month before notice to proceed was issued. But Mopac refers the court to a letter of August 12, 1969, from Johnson to Mopac in which additional compensation is requested for costs related to drilling through steel and claims this to be evidence of the date of the steel's discovery. This request for compensation is not necessarily probative of when the steel was first discovered, and we hold that the district court's finding in this regard is not clearly erroneous. Rule 52(a), F.R.Civ.P.

Mopac next contends that no evidence was offered to indicate that the unexpected presence of the rock ledge actually caused delay. A large portion of the ledge had to be blasted and leveled and the box cofferdam originally called for was abandoned in favor of a cellular cofferdam. Both Young, and Early Owen, an ABD engineer, testified that the originally designed method of construction would have taken three months. The alternative actually employed was not completed until almost a year after the discovery of the rock ledge. We have examined the record as it relates to this matter and again find no clear error in the district court's finding.

Finally, Mopac contends that the real reason for the delay was high water which forced Johnson to stop working on a number of occasions. The main problem appears to have been with the shoofly. Mopac's specifications called for shoofly piles that barely cleared the pool elevation of the river. Concrete pier caps were to be formed on top of the shoofly piles. Apparently heavier rains than normal caused the water level to rise and postpone construction of the pier caps. Mopac claims that the high water problem was not apparent until after it gave notice to proceed to ABD, that the water problem was the major cause for delay, and that it should not be held liable for delay caused by a completely unforeseeable problem which was beyond its control.

Although the evidence on the high water problem is sketchy, it is apparent that the problem presented itself at least by November 29, 1968, within a week after Mopac issued notice to proceed. Had Mopac not actively interfered with ABD by giving the notice when it knew of other delay-causing conditions, the high water problem would have presented itself and Mopac could then have timed the issuing of the notice accordingly. We refuse to excuse Mopac from liability merely because a condition subsequent to its premature notice to proceed also contributed to the delay.[4]

IV.

Mopac also challenges certain aspects of the lower court's damage award relating to rent on idle equipment and field

---

[4] Similarly, in the *American Bridge* case, the court was unmoved by the fact that the true extent of the delay was unforeseen by the state at the time it gave the premature notice to proceed. *American Bridge Co. v. State*, 245 App.Div. 535, 283 N.Y.S. 577 (1935). A delay estimated not to exceed 90 to 100 days stretched out to 21 months. Nevertheless, the state knew there would in fact be a delay, thus it was held liable for all damages incurred over the entire 21-month period.

escalation costs. Mopac argues that ABD failed to carry its burden as to when equipment charges to Mopac should have begun. Mopac claims that it cannot be charged for equipment that stood idle during the delay until such equipment arrived at the job site in Little Rock. The effect of this argument is to reduce the award for 83 days of equipment rental to 64 days rent. Alternatively, Mopac argues that if the usual business practice is applied of charging from the date the equipment was shipped from its old job site, then Mopac established that the equipment in question was shipped on a date later than that found by the district court. The consequence of this argument is to reduce the 83 days rent to 68 days.

The district court noted that there was conflicting evidence surrounding when the equipment left the old job site. The court then concluded that ABD could appropriately charge from the date when the equipment was released from its prior job—regardless of whether it was shipped to Little Rock on the date of release. It reasoned, "[W]hen the defendant creates a condition where the equipment cannot be used even after its arrival at the job site, it is not in a position to complain that the equipment was not promptly shipped as soon as it was available." Once the fact of damages is established, trial courts are allowed considerable leeway in arriving at the amount. *Eastman Kodak Co. of New York* v. *Southern Photo Materials Corp.*, 273 U.S. 359, 378-79 (1927); *Clements Auto Co.* v. *Service Bureau Corp.*, 444 F.2d 169, 190 (8th Cir. 1971). We hold that the district court's award in this regard was fair and reasonable.

Mopac also argues that it should not have been charged rent on a crawler crane and tugboat because the evidence showed that neither piece of equipment was operative during the entire period claimed. The district court found that both pieces of equipment were operative for the majority of the time period claimed; then the court deducted ten days rent on the crawler

crane and seven days on the tugboat to account for downtime. Again, we find no error in the lower court's calculation of this aspect of the damage award.

The final element of the damage award challenged by Mopac is $68,276.78 in field escalation costs awarded to compensate ABD for higher labor costs which it was forced to pay because its work extended beyond the originally anticipated completion date. Mopac argues that these costs would have occurred regardless of whether it had actively interfered with the start of ABD's operations, thus it should not be liable for them. We reject this argument. What Mopac essentially argues is that it is Johnson's fault that ABD started its work late, finished it late, and suffered increased costs as a result. But Mopac's liability for Johnson's difficulties has already been established. *Al Johnson Constr. Co.* v. *Missouri Pacific Railroad, supra.* The district court awarded the field escalation costs on the theory that ABD would not otherwise be made whole for the actual damages and expenses it incurred as a result of the delays. It is established that when performance extends beyond the originally scheduled performance time because of delay, increased costs after the original completion date are not part of the business risks assumed by the contractor and damages may properly be awarded to cover those increased costs. *See J. D. Hedin Const. Co.* v. *United States,* 347 F.2d 235 (Ct.Cl. 1965); *Abbett Electric Corp.* v. *United States,* 162 F.Supp. 772 (Ct.Cl. 1958). Thus we affirm the district court's award of field escalation costs.

Accordingly, the judgment of the district court is affirmed.

McMILLIAN, Circuit Judge, dissenting.

I respectfully dissent. I would reverse and remand to the district court with instructions to reduce the damages award to an allowance of damages for only twenty-five days. First, I am of the opinion that the agreed upon "no damage" clause

precludes recovery, and secondly, I can find no affirmative, willful bad faith act to support the active interference theory advanced by ABD.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-76-C-354

United States Steel Corporation,
Plaintiff,

v.

Missouri-Pacific Railroad Company,
Defendant.

MEMORANDUM AND ORDER

On July 17, 1978, the Missouri Pacific Railroad Company (Mopac) and the American Bridge Division of United States Steel Corporation (ABD) entered into a written contract to construct the superstructure replacement of certain portions of two existing bridges over the Arkansas River, the Baring Cross Bridge and the Junction Bridge. The relevant portions of that contract are contained in the provisions in Appendix I attached. According to the original construction schedule, ABD was to begin work on the Junction Bridge in September, 1969.

The Al Johnson Construction Company (Johnson) contracted to construct the substructure of the two bridges with a scheduled completion date of August 6, 1969. In fact, it did not complete its work until January 19, 1970, because the actual conditions encountered by the substructure contractor differed substantially from those which were indicated by Mopac and upon which Johnson relied. *See Al Johnson Construction Company v. Missouri Pacific Railroad Company*, 426 F.Supp. 639 (E.D. Ark. 1976). Mopac was to have 10 days thereafter to

ready the track on the shoofly. It was not, however, until February 23, 1970, that traffic on the Junction Bridge actually was routed to the shoofly. This constituted a 25 day delay according to both parties. The effect of the remainder of the delay between September and February, a total of 150 days, during which time Johnson continued its work and during which time ABD could not begin, is, however, at issue.

The second period of delay of 51 calendar days occurred because corrective work was required at the south abutment of the Junction Bridge. ABD requested a 51 day extension of time for completion, which Mopac denied, arguing that because ABD modified its construction sequence, other work continued and any actual delays in the entire work project were minimal and to be expected. There is no dispute over whether this 51 day delay occurred, and the Court so finds. Rather, the dispute concerns the extent to which ABD accrued damages, an issue reserved for the second phase of this cause of action.

The third period of delay occurred when Mopac failed to remove traffic from the Baring Cross Bridge in the specified time. Mopac admits to a 20 day delay; it states that traffic was off the Baring Cross Bridge on October 10, 1970, and that ABD began work that day. ABD claims 23 days delay; it claims that it could not begin until October 14.

There are additional questions concerning damages, i.e., additional construction costs and interest on contract price retainage. Determination of these issues will await the second trial phase. ABD also claims additional demurrage, equipment rental, and overhead on behalf of its subcontractors, Rosick and Sachs. In the record is the report prepared by Sverdrup & Associates for Mopac, submitted on July 23, 1973, which states:

> "We have made a cursory review of these subcontractors' claims which are actually unliquidated claims against ABD. Work performed and equipment supplied by Rosick

> Construction Company, Sachs Electric, and Earle Gear and Machine Company were provided under contracts with American Bridge, not Missouri Pacific. These subcontractors must therefore look to American Bridge for relief on their claims."

Therefore, Mopac's liability, if any, for the subcontractors' losses is derivative of its liability, if any, to ABD. *See generally, United States* v. *Blair*, 321 U.S. 730, 737-38 (1943). The amount of any damages, of course, will be determined in the later trial phase.

I.

There is no dispute over the material facts of the 150 day delay. Johnson was to complete substructure construction by August 6, 1969. On October 24, 1968, ABD was given notice that it had been awarded the superstructure contract. *On November 22, 1968,* ABD was given notice to proceed with the contract work. Prior to the giving of said notice by Mopac, Johnson had encountered an unexpected rock ledge and the water was high. Based on the time requirements in the contract, ABD proceeded, projecting a start-up date of September 1, 1969, as indicated by the schedule submitted to Mopac December 12, 1968. On March 11, 1969, E. T. Franzen, chief engineer for Mopac, informed ABD that Johnson had revised its schedule to indicate substructure completion by December 14, 1969, and completion of the shoofly (and thus a later possible start-up time for ABD) on November 2, 1969. ABD revised its schedule. On July 2, 1969, Mopac informed ABD that Johnson, now expecting shoofly completion on December 31, 1969, had again revised its schedule. These changes were necessitated by a variety of unexpected difficulties. On December 19, 1969, ABD informed Mopac that it was impossible to stop shipments which were to be delivered in accord with the previous revised start-up date in early January, 1970, subse-

quently changed to the week of January 26-February 1, 1970. The first steel had been shipped at least by December 12, 1969; the first shipment arrived December 29, 1969. On January 5, 1970, ABD moved on site and on January 8 Mopac informed ABD that the shoofly would not be ready until the second week in February. It was February 23, 1970, when ABD could commence its work. As is stated in the October 23, 1970 letter from Mopac to ABD:

> "American Bridge's original construction schedule indicated site work to begin on September 1, 1969. Our records indicate that you were unable to proceed . . . until February 23, 1970. According to the calculatons of our Engineer, this resulted in an unavoidable delay on your part of 175 days. . . ."

It is the legal effect of this delay which is at issue. As has been previously noted, Mopac has acknowledged the validity of ABD's claim concerning the 25 day delay in rerouting traffic to the shoofly.

But the defendant maintains that under the terms of the contract, ABD has no claim for the other 150 day period because that delay resulted from the failure of the substructure contractor to complete its work on schedule. The contract states:

> "Failure of the substructure contractor to complete his work on a specified date or dates shall not form a basis for claim for extra compensation by this superstructure Contractor."

Courts have upheld the validity of such "no damage" clauses. *See generally* 74 ALR 3d 187 (1976). There is no ambiguity in this language, and the Court must enforce the contract according to its terms. *The Binghamton Bridge*, 70 U.S. (3 Wall) 51, 75 (1865). The enforcement of a "no damage" clause like this one, however, requires that it be strictly construed against the

owner. *F. D. Rich Co. v. Wilmington Housing Authority*, 392 F.2d 841, 843 (3d Cir. 1968). While it is arguable that the word "failure" admits of a meaning of willful neglect, it is more likely, in view of the provisions of the contract as a whole, that the word, as used in the "no damage" clause, means nothing more than omission of performance. See, for example, Section 3(4). Thus, for whatever reason the superstructure was not completed, the nonperformance of Johnson cannot serve as the predicate for damages from the railroad, it having expressly and unambiguously shifted the risk of such nonperformance to the superstructure contractor.

However, other portions of the contract spell out circumstances under which the superstructure contractor can recover, thus indicating that the "no damage" clause is limited to the one specific circumstance, i.e., late performance by the substructure contractor. Article 35 of Section 1 of the contract (see Appendix) provides that the company *may* suspend work upon 10 days written notice without liability for damages or lost profits. This article confers certain benefits on the contractor should the company elect to suspend the work. But there is nothing in this section that *requires* Mopac to declare a work suspension. Rather, the section is a clear statement of rights in the event that Mopac should decide to declare a work suspension. While it is clear that such a suspension of ABD's obligation to begin work as per the contract would have been warranted given the delay in Johnson's work, it is not true that the contract created any duty that Mopac breached when it did not give written notice of a work suspension, as it could have done.

The "changed conditions" section applied "insofar as actual subsurface work is to be carried on . . ." and affects the Mopac-Johnson contract directly since Johnson alone was responsible for the subsurface work. In any case, Mopac did make an adjustment in the time of completion when it allowed an extension of 175 days in which ABD could complete its work thus reliev-

ing ABD from any claim for liquidated damages resulting from such delay. (Contract Section 1, Article 13). The different subsurface conditions did not *directly* affect ABD's case. The changed conditions section does not provide a specific basis for ABD's recovery other than as an indication that recovery under some circumstances was contemplated by the parties when they entered into this contract.

It is stretching the language of Article 43 beyond reasonableness to include another contractor's delay in the changes which the company was entitled to make and for which ABD could recover, those changes having been limited to those "in the nature or dimensions of the work." Such a change was not made by Mopac.

In sum, the "no damage" provision placed the risk of the substructure contractor's delay on ABD. Other contract provisions conferred on ABD the right to recover additional costs in certain circumstances. Those circumstances, however, did not occur.

ABD is nevertheless entitled to recover the costs of the 150 day delay because the active interference by Mopac in issuing its notice to proceed created an exception to the enforceability of the "no damage" clause. That the loss due to Johnson's failure to complete its scheduled work was to be borne, by ABD is clear. According to the contract, ABD had an affirmative duty to keep itself informed and to adjust its schedule to Johnson's performance. Until the notice to proceed was issued, ABD had free choice and complete flexibility to reschedule its orders and its work force. But it lost this freedom and flexibility when Mopac issued the notice to proceed on November 22, 1968, at a time when Johnson had already encountered the unexpected rock ledge, redesigned its cofferdam, and found steel in the river bed, all of which should have indicated to Mopac that adjustment in schedules would be necessary because of the inevitable delay these changes would bring in the completion of the

substructure work. The notice to proceed had a coercive and restricting effect upon ABD by virtue of the provisions of the contract.

Section 1 of the general specifications, item 12, states in unambiguous language:

> "The contractor *will be required to commence work under the Contract within 10 calendar days after the date of receipt of Notice to Proceed,* to prosecute and work with faithfulness and diligence so as to complete the entire work not later than the number of calendar days stipulated in Section 3 and the Proposal after date of receipt by the Contractor of written Notice to Proceed. Extension to the time allowed for completion may be granted pursuant only to the provisions set forth elsewhere in these Specifications." (Emphasis added).

The Court finds ABD's loss from the delay must be attributed directly to Mopac's notice. Although the notice to proceed was dated November 22, 1968, it was not until March 11, 1969, that Mopac acknowledged that Johnson was experiencing delay and the repeated rescheduling began. It was October 23, 1970, when Mopac informed ABD that it would be given an extension of 175 days. Until that notification, ABD was bound by the contract to proceed diligently to prosecute the work in accord with the changing schedules provided to it. Mr. E. O. Owen, ABD's engineer, testified that the notice to proceed meant just that. Mill orders and schedules, shop orders, etc., would proceed immediately. Mill orders were not easy to reschedule once placed. Mr. Ed Young testified for the defendant that the notice meant, "Start your work." ABD did, in fact, schedule its work in reliance on the notice. The contractual duty did not provide flexibility to ABD to use its best judgment and make adjustments accordingly. No matter how well informed ABD's staff was, it would have been unable to change its schedule to reflect the realities, inasmuch as ABD was bound to comply

with the schedule provided by the railroad. Had it not, it would have been in breach of its contract. Obviously, ABD made adjustments as it went along, so that it did not incur straight line damages throughout the 150 day period. Proof of actual damages must, of course, await the second phase of this action. But when Mopac issued its notice to proceed to ABD, ABD became entitled to recover its extra costs incurred *because of* the active interference of the company.

That active interference creates an exception to the enforceability of a "no damage" clause is clear. In *Taylor-Fichter Steel Constr. Co.* v. *Niagra Frontier Bridge Com.*, 261 App.Div. 288, 25 N.Y.S. 2d 437, *aff'd* 287 N.Y. 669, 39 N.E. 2d 290 (1941), the Court stated:

> "Undoubtedly there was implied in a contract of this nature [a similar "no damage" clause] an obligation on the part of the defendant [the contractee] that it would not do anything that would unreasonably interfere with the opportunity for plaintiff [the contractor] to proceed with its work in the manner provided by the Contract, and *to permit plaintiff to carry on that work with reasonable economy and dispatch.*" (Emphasis added).

In another case in which the clause stated that no claim could be made for any damage due to delays in the completion of another contractor's work, the court allowed recovery not because of a 21 month delay but for the State's direction to proceed in spite of the delay, which amounted to active interference by the State. *American Bridge Co.* v. *State*, 245 App.Div. 535, 283 N.Y.S. 577 (1953). For there to be active interference, more is required than mistake or mere negligence. *Peter Kiewit Sons Co.* v. *Iowa Southern Utilities Co.*, 355 F.Supp. 376 (D.Iowa 1973). When in spite of its knowledge of likely delay Mopac issued the notice to proceed, not merely mistake or negligence, but rather an affirmative act took place. There was active interference, was determined by the particular circumstances

herein and by the relevant contractual provision. In the presence of such active interference, "no damage" clauses are unenforceable. *See E. C. Const., Inc.* v. *Manhattan Construction Co.*, 551 F.2d 1026, *reh. gr. on other grounds*, 559 F.2d 268 (5th Cir. 1977). *See also, Gasparini Excavating Co.* v. *Pennsylvania Turnpike Commission*, 187 A.2d 157 (Pa. 1963); *Garofano Construction Co., Inc.* v. *State*, 183 Misc. 1080, 52 N.Y.S. 2d 186 (1944). *Cf.* Cauldwell-*Wingate Company* v. *State*, 276 N.Y. 365, 12 N.E. 2d 443 (1938).

In *United States* v. *Foley*, 329 U.S. 64 (1946), an electrical contractor signed a standard form government contract to install airfield lights. He agreed to complete work 120 days after notice to proceed. It took 277 days because a unique method of building the runways on which lights were to be installed took longer than anticipated. There was no indication that the government knew of any delay when it gave notice to proceed. The Court of Claims agreed that the government's failure to make the runways available in time constituted a breach for which the contractor could recover damages. There was no express covenant in the contract to provide runways at specified times. The Supreme Court reversed and found no obligation for the government to pay damages for delay. The contract specifically spelled out procedures to be followed in case of delay and the Court said that these procedures governed. The government, concluded the Court, was not liable for damages solely because of delay in making the work available.

Obviously, the case before the Court is not the same. It was not Mopac's delay, but the subcontractor's, which caused the problem and which the contract addressed. Procedures are not spelled out. Liability in this case is not predicated merely on delay, but rather on the active interference of Mopac when it, with knowledge (apparently unlike *Foley*), gave notice to proceed. Even given the facts in *Foley*, Justices Reed, Frankfurter, and Jackson dissented, stating:

> "it is admitted that the government had given the contractor 'notice to proceed' which in our opinion had the legal consequences set forth in the opinion of the court below whose judgment we would affirm."

United States v. *Foley Co., supra,* at 69. In discussing *Foley, supra,* the Court of Claims stated:

> "This exculpetory rule is not applicable to a situation in which unreasonable delays were the result of defendant's failure to promulgate property drawn specifications or otherwise the fault of the government."

J. L. Simmons Co. v. *United States,* 412 F.2d 1360, 1382 (Ct. Cl. 1969). Judge Howard addressed this latter question in *Texarkana Housing Authority* v. *Johnson Construction,* 264 Ark. 523 (Ark. 1978):

> "We are persuaded that where, as here, the owner supplies plans and specifications to a contractor detailing the work to be performed, the owner implicitly warrants the adequacy and suitability of the plans and specifications for the purpose for which they are tendered. We are further persuaded that this implied warranty is not nullified by any stipulation requiring the contractor to make an on-site inspection where the repairs are to be made and a requirement that the contractor examine and check the plans and specifications. However, a competent and experienced contractor cannot rely upon submitted specifications and plans where he is fully aware, or should have been aware, that the plans and specifications cannot produce the proposed results. Therefore, where delays result, as here, because of faulty specifications and plans, the owner will have to respond in damages for the resulting additional expenses realized by the contractor. Moreover, the owner's breach of its implied warranty may not be cured by simply extending the time of the performance of a contractor's

assignment. *See: J. D. Hedin Construction Co.* v. *United States,* 347 F.2d 235 (1965); *Litchfield Mfg. Corp.* v. *United States,* 338 F.2d 94 (1964); *Centrex Const. Co., Inc.* v. *Worth James, d/b/a Worth James Const. Co., et al,* 374 F.2d 921 (1967)."

Mopac supplied plans to Johnson which proved to be inaccurate. The shortness of the time for bid preparation and high water limited Johnson's ability to check out the specifications, and Mopac did not expect bidders to make independent explorations. *Al Johnson Construction Co.* v. *Missouri Pacific Railroad, supra.* The court in that case ruled that Johnson found conditions materially and substantially different from conditions disclosed on Mopac's plans, specifications and borings. Mopac was required to reimburse Johnson for added costs due to the different conditions. In this case, the effect of the owner's breach of its implied warranty extended to ABD as well because its delay in moving on site was the result of Johnson's late substructure completion which, in turn, was the result of its reliance on Mopac's faulty plans.

ABD should not bear the cost of the 150 day delay because it was Mopac's active interference which prevented ABD from protecting its own interests as it could have done had it retained flexibility to schedule and had the other contractor proceeded with accurate specifications.

II.

The only issue concerning the delay at the Baring Cross Bridge is whether it was 20 or 23 days in duration. The flow chart submitted by the defendant indicates that trackwork was completed October 3, signal work on October 9, and that Baring Cross traffic was routed to the shoofly on October 9. The job diary of E. T. Owen, construction engineer for ABD, recorded:

"October 9, 1970 - Conversation with C. E. Tucker. Start removing rail Monday. Letter for Shoo-fly on 14th. Traffic off Bearing [sic] Cross today.

"October 13, 1970 - Conversation with C. E. Tucker. Hartselle writing letter re Shoo-fly. When are we going to start on Bearing Cross. Rain holding us up."

(Mr. C. E. Tucker was the Mopac engineer.) There is no mention in the October 14 diary entry of beginning work on the Baring Cross Bridge. Mr. Owen's testimony reiterated that on October 9 traffic was off the bridge, that rail was removed on Monday, October 12, and that ABD got to work on Baring Cross on October 13.

The Sverdrup & Associates' report dated July 23, 1973 (plaintiff's exhibit 53) stated:

"Mr. Young's diary indicates that traffic was off the Baring Cross Bridge and on the shoofly on Saturday, October 10, 1970. His dairy also indicated that some ABD forces were working on the Baring Cross Bridge on October 10, 1970. His diary also indicates that some ABD forces were working on the Baring Cross Bridge on October 12 and that some punch list work was being done on the Junction Bridge during this time."

According to the terms of the contract, it was only after Baring Cross rail traffic was detoured onto the shoofly that alteration work on the Baring Cross Bridge could begin (section 2(2)). All trackwork, both installation and removal, was to be handled by Mopac (Section 2(1)). The contractor was to cooperate and coordinate his operations with those to be done by the company, such as removing or laying track (Section 3(6)).

While the evidence is not unequivocal, the preponderance indicates that Mopac finished rerouting traffic onto the shoofly

on October 9 and the bridge was thus ready, under the contract terms, on October 10, 1970. ABD may not have begun until later, possibly held up by rain or the need to coordinate trackage work, but the railroad turned over the Baring Cross Bridge when the shoofly accepted its traffic on October 10, 1970. Mopac is liable, therefore, for such damages as may be shown to have been caused by the admitted 20 day excessive delay in not removing traffic from the Baring Cross Bridge prior to October 10, 1970.

III.

In accord with the foregoing, the Court finds that Mopac is liable for such damage as may be proved to be the result of the 25 day delay in rerouting the Junction Bridge traffic.

The Court further finds that Mopac incurred liability for damages arising from the 150 day delay before ABD could proceed, inasmuch as its notice to proceed, given and unrevised in the face of its knowledge of likely substantial delay, constituted active interference which rendered inoperative the "no damage" clause.

A delay of 51 days was caused by problems at the south abutment of the Junction Bridge. The impact of this delay, if any, must be shown in the second phase of the trial.

ABD was unable to begin work on the Baring Cross Bridge until October 10, 1970, and thus suffered a delay of 20 days, for the costs of which Mopac is liable.

The claims of subcontractors Rosick and Sachs against ABD for additional demurrage, equipment rental, and overhead during the aforementioned periods of delay were incurred as the result of Mopac's action and the amount thereof may be submitted during the determination of damages.

It is so Ordered.

Dated this 15th day of February, 1980.

/s/ Garrett Thomas Easile
United States District Judge

APPENDIX - RELEVANT PROVISIONS FROM THE CONTRACT

Section 1
General Provisions

6. Interpretation Of Estimated Quantities.

Bidders' attention is directed to the fact that the estimate of quantities of all work to be done and materials to be furnished under the contract is approximate and given only as a basis for calculation of prices upon which award of contract is to be made. The Company does not assume any responsibility that the final quantities will remain in strict accordance with estimated quantities, nor shall the Contractor plead misunderstanding or deception because of such estimate of quantities, of the character or location of the work, or of other conditions pertaining thereto. . . .

7. Examination Of Plans, Specifications And Site Of Work.

It shall be understood that the Contractor has, by careful examination, satisfied himself as to the nature and location of the work, the conformation of the ground, the character, quality and quantity of the materials to be encountered, the character of equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and all other matters which can in any way affect the work under this Contract. . . .

12. Starting Work, Prosecution And Completion.

The contractor will be required to commence work under the contract within 10 calendar days after the date of receipt of Notice to Proceed, to prosecute said work with faithfulness and diligence so as to complete the entire work not later than the number of calendar days stipulated in Section 2 and the proposal after date of receipt by the contractor of written Notice to Proceed. Extension to the time allowed for completion may be granted pursuant only to the provisions set forth elsewhere in these Specifications.

35. Suspension Of Work.

The company may at any time stop the work, or any part thereof, by giving ten days' notice to the contractor in writing. The work shall be resumed by the contractor within ten (10) days after the date fixed in the written notice from the company to the contractor so to do. The company shall not be held liable for any damages or anticipated profits on account of the work being stopped, or for any work done during the interval of suspension. It will, however, pay the contractor for expense of men and equipment necessarily retained during the interval of suspension, provided the contractor can show that it was not reasonably practicable to move these men and equipment to other points at which they could have been employed. The company will further pay the contractor for time necessarily lost during such suspension at the rate of ten (10) percent per annum on the estimated value of materials, equipment and fixtures furnished by the contractor on the work which are necessarily idle during such suspension, said rate of ten (10) percent per annum being understood to include depreciation, interest and insurance, but if the work, or any part thereof, shall be stopped by the notice in writing aforesaid, and if the company does not give notice in writing to the contractor to resume work at a date within thirty (30) days of the date fixed in the written notice to

suspend, then the contractor may abandon that portion of the work so suspended and he will be entitled to the estimates and payments for work done, on such portion so abandoned, as provided in the Article entitled "Final Estimate" of this contract.

41. Unavoidable Delays: Extension Of Time On Parts Of Work.

The time allowed for construction under this Contract has taken into account normal weather conditions and the proposed starting date of actual construction. . . .

43. Changes.

The company shall have the right to make any changes that may be hereafter determined upon, in the nature or dimensions of the work, either before or after its commencement, and such changes shall in no way affect or void the obligations of this contract. If such changes make any change in the cost of the work, an equitable adjustment shall be made by the Chief Engineer to cover the same, but the contractor shall not claim compensation for anticipated profits.

44. Alteration Of Plans Or Quantities.

The fact that nature, the weather, physical conditions or other conditions not directly caused by the Company may prove to be different from that which the parties anticipated or contemplated when the Contract was originally executed shall not be considered an alteration. . . .

49. Funds Available For Payment.

Funds for completion of all work provided for herein are not available from present appropriations and payment therefor is dependent upon future appropriations or allotments. . . .

Sect' 2
Special Conditions

3. Starting Work And Completion.

Reference is hereby made to the requirements of Section 3 of these specifications entitled "Order of Work, Scheduling and Completion" which sets forth definitive requirements for the scheduling and completion of the various phases of the construction. Pursuant to the requirements and provisions of Art. 12 of Section 1, therefore, the contractor shall commence work under this contract within ten (10) calendar days after receipt of written Notice to Proceed and shall prosecute the work so as to complete the various phases of the work within the time limits stated.

Liquidated damages will be imposed in case of failure by the contractor to complete any of the phases within the time limit provided in the contract, unless otherwise stated in the proposal.

8. Changed Conditions.

The following stipulation will apply to this contract insofar as actual subsurface work is to be carried on under contract items, such as removal of existing structures and, if necessary in connection therewith, the construction of temporary enclosures for the purpose of removing such structures. It is not considered applicable in cases of driving bearing type piles or construction of other supporting elements for falsework or temporary structures and facilities which do not by their nature necessitate excavating progressively below existing ground line or stream bed.

As the various portions of the subsurface are penetrated during the work, the contractor shall, promptly and before such conditions are disturbed, notify the Engineer at the project site and company in writing if the actual conditions differ substan-

tially from those which were indicated or normally inherent in the nature of the work or if obstructions obviously foreign to the natural character of the substratum or previously unknown obstructions are encountered. If in concurrence therewith, the Engineer at the site will promptly submit to the contractor a plan or description of the modifications which he proposes should be made in the contract documents. The resulting increase or decrease in the contract price of time allowed for the completion of the contract shall be estimated by the contractor and submitted to the Engineer at the site in the form of a proposal. If approved, the proposal will be certified and forwarded to the company, with recommendations for approval. If no agreement can be reached between the parties hereto, the question shall be resolved according to the provisions contained in Art. 15 of the General Provisions hereof. The contractor shall, in the meantime, proceed with the work if directed in writing to do so by the Engineer at the site and authorized by the company. Upon said settlement of any such dispute, the contract price and time of completion shall be adjusted by the issuance of a change order in accordance with the provisions for "Changes" and "Unavoidable Delays: Extensions of Time on Parts of Work."

18. **Cooperation Between Contractors And Others.**

During prosecution of work under this contract, there may be work already underway or commenced in adjacent areas under other contracts, both outside of and within the river. It is, furthermore, contemplated that the substructure work for the bridges involved in this contract to the extent elsewhere described, will be in progress and there are functions elsewhere described which will be performed by the Company with its own forces.

Full cooperation of all contractors involved and of the Company's personnel in careful and complete coordination of their respective activities in the area will be required. Each contractor

shall so schedule and conduct his work as to avoid unnecessary inconvenience and delay to others and shall conduct his work in such manner as not to damage work being performed or completed by others. When necessary for proper prosecution of work, each contractor involved in the improvement of the bridges, of which this superstructure work is a part, shall permit the other access through the overlapping construction areas and to use any access or haul roads constructed by either contractor in his work.

28. **Construction Schedule, Progress Charts And Reports.**

Within 30 days after receipt of Notice to Proceed, the contractor shall, at his expense, submit to the Engineer four (4) reproducible copies of a satisfactory schedule, showing the order in which, consistent with the requirements of these specifications, the contractor proposes to carry on the work, the dates upon which he proposes to start the several salient features of the work, and the contemplated dates for completing same. The schedule shall be in the form of a progress chart of a suitable scale to appropriately indicate the percentages of work scheduled for completion at any time. The contractor shall keep this chart current monthly and furnish the Engineer four (4) reproducible copies of the chart at the end of each month showing the actual progress of the work during that month or at such other intervals as directed by the Engineer, and shall deliver to the Engineer four (4) reproducible copies thereof.

In addition to the construction schedule and progress charts hereinabove described, the contractor shall, if so directed by the Engineer, furnish the Engineer with such other reports as may be deemed necessary to fully inform him of the work performed.

Section 3
Order Of Work, Scheduling And Completion

2. Cooperation Between Contractors.

For the Contractor's information, it is expected that the substructure contract will be awarded and Notice to Proceed given to the substructure contractor during July, 1968. As of the date of these specifications, the substructure contractor is required to arrange the various phases of his work so as to meet the following schedule of times after date of receipt by him of Notice to Proceed, unless extended in each case by authority of the Company for sufficient cause in accordance with the governing contract provisions:

(1) To substantially complete the shoofly (other than trackwork), giving precedence to completion of the Junction Connection in order to permit the Company ample time to complete trackwork thereon - *365* Calendar Days. Over and above this time, *10 Calendar Days* is allowed for completing the trackwork and incidentals necessary for implementing the rerouting of Junction Bridge traffic to the shoofly and to complete relocation of utilities off Junction Bridge and on to the Shoofly.

(2) To complete the Junction Bridge (new) North and South Piers and Pier Protection Cells - *375 Calendar Days.*

(3) To include all remaining construction, if any, in the shoofly and complete all substructure work at Baring Cross Bridge, including construction of Pier Protection Cells together with construction of Piers 5 and 6 to Elevation ±251 and ±252, respectively - *550 Calendar Days.*

Actual completion dates computed from the above allowance, however, cannot be guaranteed and the Contractor shall appraise the current status and expected progress of the work under this substructure contract and consider these in his scheduling. Failure of the substructure contractor to complete his work on a specified date or dates shall not form a basis for claim for extra compensation by this superstructure Contractor.

4. Stage I Construction (Commencement And Commencement And Completion Time Allowed) - Junction Bridge.

* * *

Unless impossible to do so by reason of incompletion of the substructure work under previous contract, the Contractor shall commence his work in the field at Junction Bridge. If in case work is being carried by the Contractor at other locations, Junction Bridge field work shall be commenced promptly upon removal of rail traffic from the bridge. If in case the Contractor has not started any field work by the time the substructure contractor has nearly completed the shoofly bridge and pier construction at Junction Bridge, he shall keep himself informed of the progress of the substructure contractor and mobilize as necessary in order to be prepared to commence promptly upon removal of rail traffic from the bridge. . . .

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-76-C-354

United States Steel Corporation,
Plaintiff

v.

Missouri-Pacific Railroad Company,
Defendant

MEMORANDUM ON DAMAGE ISSUES

In its February 15, 1980, decision on the basic liability issues the Court said, *inter alia:*

> . . . That the loss due to Johnson's failure to complete its scheduled work was to be borne by ABD is clear. According to the contract, ABD had an affirmative duty to keep itself informed and to adjust its schedule to Johnson's performance. Until the notice to proceed was issued, ABD had free choice and complete flexibility to reschedule its orders and its work force. But it lost this freedom and flexibility when Mopac issued the notice to proceed on November 22, 1968, at a time when Johnson had already encountered the unexpected rock ledge, redesigned its cofferdam, and found steel in the river bed, all of which should have indicated to Mopac that adjustment in schedules would be necessary because of the inevitable delay these changes would bring in the completion of the substructure work. The notice to proceed had a coercive and restricting effect upon ABD by virtue of the provisions of the contract.

Section 1 of the general specifications, item 12, states in unambiguous language:

> "The contractor *will be required to commence work under the Contract within 10 calendar days after the date of receipt of Notice to Proceed,* to prosecute and work with faithfulness and diligence so as to complete the entire work not later than the number of calendar days stipulated in Section 3 and the Proposal after date of receipt by the Contractor of written Notice to Proceed. Extension to the time allowed for completion may be granted pursuant only to the provisions set forth elsewhere in these Specifications." (Emphasis added).

The Court finds ABD's loss from the delay must be attributed directly to Mopac's notice. Although the notice to proceed was dated November 22, 1968, it was not until March 11, 1969, that Mopac acknowledged that Johnson was experiencing delay and the repeated rescheduling began. It was October 23, 1970, when Mopac informed ABD that it would be given an extension of 175 days. Until that notification, ABD was bound by the contract to proceed diligently to prosecute the work in accord with the changing schedules provided to it. Mr. E. O. Owen, ABD's engineer, testified that the notice to proceed meant just that. Mill orders and schedules, shop orders, etc., would proceed immediately. Mill orders were not easy to reschedule once placed. Mr. Ed. Young testified for the defendant that the notice meant, "Start your work." ABD did, in fact, schedule its work in reliance on the notice. The contractual duty did not provide flexibility to ABD to use its best judgment and make adjustments accordingly. No matter how well informed ABD's staff was, it would have been unable to change its schedule to reflect the realities, inasmuch as ABD was bound to comply with the schedule

provided by the railroad. Had it not, it would have been in breach of its contract. Obviously, ABD made adjustments as it went along, so that it did not incur straight line damages throughout the 150 day period. Proof of actual damages must, of course, await the second phase of this action. But when Mopac issued its notice to proceed to ABD, ABD became entitled to recover its extra costs incurred *because of* the active interference of the company.

• • •

In accord with the foregoing, the Court finds that Mopac is liable for such damages as may be proved to be the result of the 25 day delay in rerouting the Junction Bridge traffic.

The Court further finds that Mopac incurred liability for damages arising from the 150 day delay before ABD could proceed, inasmuch as its notice to proceed, given and unrevised in the face of its knowledge of likely substantial delay, constituted active interference which rendered inoperative the "no damage" clause.

A delay of 51 days was caused by problems at the south abutment of the Junction Bridge. The impact of this delay, if any, must be shown in the second phase of the trial.

ABD was unable to begin work on the Baring Cross Bridge until October 10, 1970, and thus suffered a delay of 20 days, for the costs of which Mopac is liable.

The claims of subcontractors Rosiek and Sachs against ABD for additional demurrage, equipment rental, and overhead during the aforementioned periods of delay were incurred as the result of Mopac's action and the amount thereof may be submitted during the determination of damages.

The trial on the damages issues was held on July 14-15, 1980. This memorandum will constitute the Court's findings of fact and conclusions of law with respect to those issues.

The Rosiek Derivative Claim

With respect to the Rosiek subcontract claim, the Court concludes that the measure of damages should be that which would obtain if the plaintiff itself had performed this work rather than subcontracting it. In other words, Rosiek might, under its contract with the plaintiff, be entitled to some different measure of damages, but Rosiek is not claiming against the plaintiff under that agreement. Rather the plaintiff is attempting to recover on behalf of Rosiek essentially under the terms of the plaintiff's agreement with the defendant. Although Rosiek might not be so limited in a direct action against the plaintiff, in this proceeding it must content itself with the same measure of damages which would be applicable if the plaintiff had performed the work.

Mr. Rosiek testified concerning the work he was to perform under his subcontract with the American Bridge Division of United States Steel. His work could not proceed until the completion of the Shoofly. He expected to start work in September of 1969, but could not commence that work until approximately six months later. The Court accepts his testimony that, because of the very specialized nature of his work, his company had to obligate the equipment and the personnel in accordance with Rosiek's Exhibit 1. The Court accepts the testimony as to the manpower and equipment required. It accepts the rental figures on the equipment as fair. Mr. Rosiek credited the rental charges at the rate of 50% for the "non-use" of that equipment because of the delays. The Court concludes that this credit must be considered generous. Mr. Rosiek simply adopted it because of certain experiences he had had with the Corps of Engineers. But the Corps of Engineers generally use rates per day, which turn out to be higher than rates per month on such equipment.

The payroll tax percentage of 23% and the 15% "overhead" are accepted on the basis of Mr. Rosiek's testimony as fair and reasonable.

The plaintiff would not be entitled to recover the 10% profit on behalf of the Rosiek firm. *See infra.*

The Court accepts Mr. Rosiek's testimony that, to hold his people, he had to guarantee them 40 hours of work per week and that he only charged for his labor when they could not be used for other work.

The Court finds that the equipment Rosiek is attempting to charge for was not used on other work. Later Rosiek did receive a job with the Arkansas Highway Department, but this work did not start until July, 1971, so there was no overlap.

Much time has now passed and some of Rosiek's records are no longer available, but the Court notes that it pressed its claim against the plaintiff promptly (in April, 1971) and consistently. It also notes that the plaintiff carefully reviewed the Rosiek claim early on and suggested certain deletions therefrom to which Rosiek agreed. And Mr. Owen testified he personally knew Rosiek's equipment was on the job as claimed.

The Court finds that the man-hours charged are fair and reasonable and less than actually needed or expended.

The Sachs Derivative Claim

The parties have stipulated that the Sachs' claim for the delays in the Shoofly construction and in rerouting traffic amounts to $11,750.00.

The American Bridge Division (ABD) Direct Claim

The Court concludes that ABD is not entitled to recover a "profit" on the damages it has sustained because of defendant's active interferences in ordering ABD to proceed

with the work. Recognizing that there are good arguments both ways, and that it is a close question, the Court reasons that, had the defendant not given ABD the notice to proceed, ABD could not have recovered any of the contested "delay" damages, much less any profit thereon. The defendant has, in effect, been denied the benefits of its contract because of its knowing and active interference. So it must pay the actual damages sustained by ABD. *See* Memorandum of February 15, 1980. Logically, then, it should not be required to pay some percentage of the actual out-of-pocket damages as "lost profit," and the Court so holds.

However, conceptually, ABD should be, and is, entitled to a reasonable profit over and above its actual damages due to delays *other than* the 150 day delay, to wit: the 25 day delay caused by the defendant's slowness in rerouting traffic from the Junction Bridge to the Shoofly; the 51 day delay caused by the work stoppage in connection with the repair of the south abutment; and the 20 day delay caused by the defendant's tardiness in restoring traffic to the Junction Bridge after the work there was completed.

The plaintiff contends that it should be permitted to recover the actual escalated costs resulting from the delays, rather than the contract "prices." It reasons that because of the some 237 days of delays it was forced to pay higher wages than anticipated. The Court agrees on the theory that otherwise plaintiff will not be made whole for the *actual* damages and expenses it incurred as a result of the delays. *See J. D. Hedin Construction Co.* v. *United States,* 347 F.2d 235 (Ct. Cl. 1965), and *Abbett Electric Corporation* v. *United States,* 162 F.Supp. 722 (Ct. Cl. 1958).

The Court is convinced that the plaintiff is entitled to prejudgment interest at the rate of six percent on the damages due to the delays since such damages were capable of ascertainment

to a reasonable degree of certainty. *Love* v. *H. F. Const.*, 261 Ark. 831, 552 S.W.2d 15 (1977). Certainly plaintiff is entitled to such interest on the retainage withheld from May 19, 1975, until January 2, 1979.

In its "Amendment to Complaint" plaintiff summarizes its claims as follows:

Summary of Claim

I -	Delays in Shoofly Substructure (150 days)		$ 56,418.46
II -	Delays in Rerouting Traffic from the Junction Bridge to the Shoofly (25 days)		31,093.28
III -	South Abutment Delays (51 days)		19,486.37
IV -	Delays in Rerouting Traffic from the Baring Cross Bridge to the Shoofly and from the Shoofly to the Junction Bridge (20 days)		20,382.08
V -	Field Labor Escalation Associated to I, II & IV		68,276.68
		Subtotal	$195,656.87
	Profit at 10% - $79,294.21 (Excl. Equip.)		7,929.42
		Total	$203,586.29
6% Interest on above from August 18, 1972 (date of claim) to July 15, 1980 (2888 days)		96,650.50	
Total			300,236.79
Invoice K-2700-SY dated 9/17/74		7,231.96	
6% Interest on above from 11/17/74 (60 days after invoice) to July 15, 1980 (2068 days)		2,458.47	
Total			9,690.43

6% Interest on $74,433 (retainage held because of squeak in bearing) from 5/19/75 (date of agreement to hold in escrow) to 1/2/79 (date of payment) [1884 days]		23,054.89
Total Claim - ABD Div. of USSC		$332,982.11

CLAIMS OF SUBCONTRACTORS

I -	Delay in Shoofly Substructure		
	Rosiek	40,304.39	
	Sachs	6,480.00	
			46,784.39
II -	South Abutment Delay (51 days)		
	Rosiek		24,470.86
III -	Delay in Rerouting Traffic		
	Sachs		9,410.00
			$80,665.25
6% Interest on above from Aug. 18, 1972 (date of claim) to July 15, 1980 (2888 days)			38,294.99
Total Claim of Subcontractors			$118,960.24

The defendant raises certain legal and factual issues concerning certain items of damage claimed by the plaintiff. First it argues that the 83 days (October 28, 1969 to January 19, 1970) claimed by the plaintiff for idle equipment in Category "A" of plaintiff's Exhibit 2 has not been established by the evidence. The plaintiff claims that the equipment in that category became available on October 28, 1969 when it was released from a bridge job with the Arkansas Highway Department in Des Arc, Arkansas. The defendant claims that the equipment did not arrive in Little Rock until November 15, 1970, and that the delay period should commence on November 16, thereby reducing by 19 days (October 28—November 15) the actual delay. The

defendant predicates its argument upon the theory that it should not be responsible until the equipment arrived on the job site in Little Rock.

The plaintiff states that its usual practice, and the practice of the industry, is to charge the "new" job for such equipment when it starts its journey from an old job site to the newjob site. However, in this case it also strongly argues that it should be permitted to charge for the equipment as soon as it was released from the Des Arc job and available for shipment to the Little Rock job. The plaintiff points out that because of the defendant's actions there was no urgency in the actual transportation of the equipment to Little Rock because there was nothing for it to do when it got there. The Court agrees with the plaintiff's contention in this respect. The equipment became available on October 28 and it must be presumed that it would have been promptly shipped upon that date if it were needed and could actually have been used in Little Rock.

There is a factual dispute as to whether the equipment departed Des Arc on October 28, November 11, or some date in between. Mr. Early Owen, plaintiff's project manager, testified with considerable certainty that the equipment left Des Arc on October 28. His own diary entries, however, suggest that the equipment departed Des Arc on a later date. It is not necessary for the Court to resolve this factual issue since it has concluded under the peculiar factual circumstances of this case that plaintiff may appropriately charge from October 28, 1969, because the equipment was released form another job on that date and was available, if needed, for prompt shipment to Little Rock. Ordinarily, plaintiff would be entitled to recover from the date the equipment was actually shipped. However, when the defendant creates a condition where the equipment cannot be used even after its arrival at the job site, it is not in a position to complain that the equipment was not promptly shipped as soon as it was available. The plaintiff is therefore entitled to the full 83 days delay for equipment in Category "A".

Secondly, the defendant contends that the crawler crane was inoperative for the entire period of time claimed by the plaintiff in the Shoofly delay and also the delay in rerouting traffic from the Junction Bridge, in other words, the period from October 28, 1969, until February 23, 1970. This contention is based upon the entries in Mr. Owen's diary which reflect a considerable amount of work on the crane during the period at issue. The plaintiff contends that there was no proof that the crane was out of commission or that it could not have been used if there were work actually to be performed prior to February 23, 1970. It notes that it was having to rent similar equipment in New York at comparable rates. Mr. Owen's position was that there was no work for the crane to do, so plaintiff's employees were therefore doing everything they could to put the crane had had to be used during the period it could have been used.

It is clear to the Court that much work had to be done on the crane and that at certain times during such work the crane could not have been used. However, since there was no urgency in the maintenance and repair work—there being no work for it to do—the plaintiff should not be penalized for the apparent casual pace of such work. If the crane had been needed, the work could clearly have been expedited. The Court is nevertheless convinced that the crane would not have been able to work the full period without downtime, assuming work were available for it to perform. Having reviewed the testimony and the exhibits, the Court finds that the defendant should be credited with seven days of the "Shoofly delay" and three days of the delay in rerouting traffic from the Junction Bridge.

Thirdly, defendant contends that the charges for the "tugboat" in plaintiff's Exhibit 2 (delay in Shoofly) and plaintiff's Exhibit 6 (delays in rerouting traffic from the Junction Bridge to the Shoofly) should be eliminated completely because one of its two propellors was damaged while being towed in a backwards position to Little Rock. It is also claimed that the

tugboat did not get to Little Rock until the end of the week of November 24, 1969. However, the proof indicates that the tugboat was indeed available on October 28, 1969, and could have been shipped earlier if it had actually been needed.

The Court accepts the testimony of Mr. Owen that the tugboat could be operated on one engine. In fact, Mr. Owen's diary note of January 2, 1970, shows that the tug was running. Mr. Owen testified that he believed it was being checked out on that occasion. Considering that necessary repair and maintenance work would be performed on an expedited basis if there was an actual need for the equipment, the Court nevertheless finds that the defendant should be given credit for seven days during the delays in Shoofly (per plaintiff's Exhibit 2).

Fourthly, the defendant contends that it should not be charged for the locomotive crane for the 14 day period from January 5, 1970, until January 19, 1970. It also claims five days' credit with respect to said equipment in plaintiff's Exhibit 6 (covering the delay period January 29—February 23, 1970).

The evidence indicates that the locomotive crane was repaired out of state and shipped to North Little Rock. It apparently arrived on January 5, 1970. The Court agrees with the defendant that, since the plaintiff failed to show the availability of the locomotive crane for shipment prior to January 5, 1970, the defendant should be given credit for the time required to set up and rig it for operation. Mr. Owen indicated that this would take approximately a week. The defendant will therefore be given seven days' credit as claimed with respect to this equipment. However, the Court does not accept the defendant's contention that the evidence shows that the crane was inoperative until February 18, 1970. It had problems and, during part of the time, had to be operated at reduced speeds. Nevertheless, the evidence shows that it was in adequate condition to perform the work required, and therefore no further credit will be allowed with respect to the locomotive crane.

General Objections of Defendant

The defendant contends that the rental rates found in Schedule A-2 improperly include a 10% profit, according to the testimony of Mr. Schmidt. The defendant further contends that an allowance for "wear and tear" is inappropriate in a situation where equipment is idled because of the unavailability of work. In other words, the equipment, because it is idled, is not subjected to the wear and tear which it would suffer if in fact it were being operated.

The plaintiff contends that it is entitled to the rental rates, which it has included in its exhibits, because this is what it would have to pay if it actually rented such equipment from others. Furthermore, there was some testimony that the plaintiff's overall, national, work requirements were such that it was required to rent similar equipment at the time on other jobs. Mr. Schmidt specifically mentioned renting two cranes in New York. There was no proof or testimony that ABD was in the business of renting equipment to others.

Considering the predicate for damages established in the Court's liability decision of February 15, 1980, the Court agrees with the defendant that plaintiff should not be permitted to include here the 10% as profit.

The Court also agrees with the defendant that some allowance should be made to reflect the fact that the idled equipment was not suffering wear and tear. It will be recalled that Rosiek made an allowance of one-half of the normal rental rate. However, the rental rates used by ABD, according to the evidence, assumed the machinery would actually be used only 22 days a month. Nevertheless ABD divided these rates by 30.417 instead of 22, reflecting an unnecessary discount of approximately one-third. ABD also eliminated the cost of fuel and lubricants. Considering all of the evidence and particularly the testimony of the witnesses concerning an appropriate allowance

for "none-use," the Court finds and concludes that the defendant is entitled to an *additional* allowance of 20% for this purpose.

The Court finds and concludes that the evidence fully sustains those items of damage which are claimed by the plaintiff but which have not been discussed specifically herein and, in particular, the Court concludes that such charges are fair, reasonable, necessary and appropriate.

The Court further concludes that there are reasonable, rational, and industry, accepted bases for plaintiff's theories of damage computation and calculation as reflected in its exhibits and the testimony of the witnesses, *except* as modified above.

Dated this 4th day of September, 1980.

/s/ Garrett Thomas Easile
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1981

No. 80-1935

United States Steel Corporation,
Appellee,

vs.

Missouri Pacific Railroad Company,
Appellant.

Appeal from the United States District Court
for the Eastern District of Arkansas

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judge Arnold took no part in the consideration of this petition for rehearing en banc.

March 12, 1982

Office - Supreme
FILED
JUL 16 1982
CLERK

In the

Supreme Court of the United States

No. 81-2312

OCTOBER TERM, 1981

Missouri Pacific Railroad Company ..... *Petitioner*

V.

United States Steel Corporation ..... *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PHILLIP CARROLL
ROSE LAW FIRM
120 East Fourth Street
Little Rock, Arkansas 72201

Counsel for Respondent

TABLE OF CONTENTS

		Page
I.	STATEMENT OF THE CASE	1
II.	REASONS FOR REFUSING THE WRIT	8
	(a) The Eighth Circuit Properly Found That MOPAC Actively Interfered.	8
	(b) There Are No Special and Important Reasons as Required by Rule 17 for Granting Certiorari.	10
III.	CONCLUSION	12

TABLE OF AUTHORITIES

Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959) (Frankfurter, J. dissent.) 11

In the

Supreme Court of the United States

No. 81-2312

OCTOBER TERM, 1981

Missouri Pacific Railroad Company ..... *Petitioner*

V.

United States Steel Corporation ..... *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

This appeal questions an award of damages resulting from only one (150 days) of four periods of delay which impeded American Bridge Division (ABD) of U.S. Steel from completing in a timely fashion its contractual obligations in replacing the superstructure of two railroad bridges across the Arkansas River at Little Rock. The work was performed in 1969-1970.

Before ABD could begin its work on the Junction Bridge, the first of the bridges to be remodeled, it was necessary for the Al Johnson Company to complete substructure work there and construct a shoofly (temporary bridge) for the rerouting of traffic. See *Al Johnson Construction Co. v.*

Missouri Pacific Railroad Co., 426 F. Supp. 639 (E.D. Ark. 1976), aff'd mem., 553 F.2d 103 (8th Cir. 1977). Johnson's contract called for completion of its work in 375 days. Johnson was given its notice to proceed on August 6, 1968 and ABD submitted its initial construction schedule showing the beginning of span removal on September 1, 1969.

Subsequent to the completion of the design for the shoofly, Missouri Pacific (MOPAC) learned that the minimum pool elevation of the river would be 231 feet following the closure of the Terry Dam in September 1968. The design of the shoofly was such that when the pool was 231 feet, the piles protruded above the water level only about a foot. Concrete pier caps had to be formed on top of the piles. It was apparent that after the Terry Dam closure, it would take little more than a drizzle upstream to raise the water level at the shoofly and make it impossible to construct the pier caps. Instead of redesigning the shoofly so that the piles would extend further up out of the water, MOPAC directed that Johnson proceed. Edward H. Young, Jr., one of the consulting engineers, admitted that the high water condition was known and that the shoofly could have been redesigned, but he disclaimed individual responsibility. (T. 151) On September 23, 1968 the elevation of the river was 230.1 feet, and it never went any lower. The river was much higher on numerous occasions, causing constant interruption of progress on the shoofly construction. The defective design made the contractual timetable a pipe dream. A chronology of important events follows:

August 17, 1968. Johnson discovered a hard rock ledge jutting out near the location of the new south pier of the Junction Bridge. This ledge was not shown on the contract documents. (426 F. Supp. 639, 643)

August 21, 1968. Discovery of the rock ledge was disclosed to MOPAC, and it was agreed that a large portion of the ledge would have to be removed in order to install the

pier. The specs required the pier to be constructed in the "dry". Johnson recommended the use of a cellular cofferdam (426 F. Supp. 639, 643). The construction of this cofferdam was more time consuming than the construction of a caisson. (T. 80) A box cofferdam could probably been completed in 3 months. (T. 150) The cellular cofferdam was not completed until July 29, 1969 which was almost a year after the rock ledge was discovered. (T. 146)

October 24, 1968. ABD was given notice that it had been awarded the superstructure contract. The contract was later back-dated to July 17, 1968. (Exhibit 7)

October 28, 1968. Al Johnson encountered hard quartz at shoofly bent 9. (Young's diary, p. 28) Drilling through quartz takes more time. (T. 152 and 173)

October 30, 1968. Al Johnson encountered steel in the riverbed at pile #6. (Young's diary, p. 29)

November 4, 1968. It was decided to dewater the pile at bent 11 to see if there was metal or something else at the bottom. Quartz was encountered at bent 6. Young's diary noted that Johnson had just about worn out the rollers on the rock bit. (Young's diary, p. 32)

November 22, 1968. ABD was given notice to proceed with its contract work. This meant that ABD's clock was started. Shop drawings had to be prepared, mill orders had to be placed, steel had to be fabricated and then shipped to the construction crew in the field. Once this work is started, it cannot be stopped. (T. 42-43) If ABD did not complete the job in the specified time, liquidated damages of $600 a day were payable.

November 29, 1968. The river rose to 235.5 feet and over the top of the shoofly piles. The cofferdam cell under the Junction Bridge turned over. (Young's diary, p. 51)

December 12, 1968. ABD submitted its construction schedule as required by the contract showing that it would be prepared to start removing the old spans from the Junction Bridge on September 1, 1969. (Exhibit 10)

December 18, 1968. Al Johnson notified MOPAC by letter that it was encountering hard rock between bents 6 and 12 of the shoofly. The existence of this hard rock resulted in increased drilling time by Johnson for 79 of 124 piles, caused extensive wear on Johnson's drilling bits, and created unexpected difficulties in properly seating the pipe pile into the subsurface rock. (Exhibit 54, Admissions 50 and 51) The hard rock formations were conditions substantially different from those which had been indicated by the borings MOPAC had furnished to Johnson. (426 F. Supp. 639, 634) The rock made Al Johnson's work more time consuming and delayed the progress of the work. (Exhibit 53, Admission 10)

March 5, 1969. Early Owen, project superintendent for ABD, made his first site visit and learned that the shoofly construction was three and one-half months behind schedule. (Exhibit 45, Owen's diary) Johnson completed filling the first cofferdam cell with stone at the south pier of the Junction Bridge. (Young's diary, p. 113) MOPAC wrote ABD advising that Al Johnson's new schedule showed completion of the substructure for the Junction Bridge on December 14, 1969. (Exhibit 11) The letter stated that Al Johnson had been advised that his revised construction schedule conflicted with ABD's fabrication and erection schedule under the terms of ABD's contract.

April 11, 1969. ABD wrote MOPAC acknowledging the notice of Johnson's delay and asked for an extension pursuant to provision 41 of the contract. The letter states, "We also wish to point out the fact that any delay in our starting construction as scheduled on September 1, 1969 will not only result in an equal delay and completion of our work, but also will cause the work to be accomplished at a higher labor cost. After the extent of the delay to our schedule is known, we will advise you of our anticipated additional costs." (Exhibit 12)

July 2, 1969. MOPAC wrote ABD enclosing a new construction schedule received from Johnson. (Exhibit 17) The schedule showed completion of the shoofly on December 31, 1969. (Exhibit 18)

July 21, 1969. MOPAC supplied ABD with another Johnson schedule which showed completion of the shoofly on January 11, 1970 and completion of the new south pier at the Junction Bridge on March 8, 1970. (Exhibit 54, Admission 91, See Exhibit 21)

July 31, 1969. Al Johnson notified MOPAC that excavation at shoofly bent 21 would have to be 3.06 feet below the excavation shown in the bid documents. Sandbags could not control the water at the lower grade, and it was necessary to construct a steel cofferdam. (426 F. Supp. 639, 645) The excavation made Johnson's work more time consuming. (Exhibit 54, Admissions 70, 71, 72, 75, 76, and 77) ABD was not advised of the problem. (T. 50)

August 18, 1969 Johnson informed MOPAC that it had encountered foreign steel while driving pipe pilings at the shoofly. (Exhibit 53, Admission 11) This made Johnson's work more time consuming. (Exhibit 53, Admission 13)

December 9, 1969. The first steel for the superstructure was shipped by ABD's fabrication plant. (Exhibit 2, T. 52)

December 19, 1969. ABD wrote MOPAC pointing out that the shoofly would not be completed until sometime between January 26 and February 1, 1970. On the same day the railroad advised ABD for the first time that it had added four pier protection cells to Al Johnson's work at the shoofly. (Exhibit 42, Exhibit 54, Admission 97) The construction of the four cells would take additional time. (T. 153) MOPAC's Exhibit 3 shows that these cells were proposed on March 17, 1969 (9 months before ABD knew about them) and had been approved by the Corps of Engineers on June 16, 1969 (6 months before ABD knew of them). The addition of these cells

made it absolutely impossible for Johnson to complete his work on time, yet on July 2, 1969, MOPAC gave ABD a schedule showing completion of the shoofly on December 31, 1969. Then, on July 21, 1969 MOPAC forwarded notice of 11 days' additional slippage; and on August 15, 1969 gave notice of 2 weeks more slippage, but it kept its silence about the known addition of the four pier protection cells. Johnson did not commence work on the new cells until January, 1970 and they were not completed until February 14, 1970. (Young's diary, p. 409)

December 29, 1969. ABD's first barge load of steel was found tied to the shoofly, having been delivered over the holidays. (Young's diary, p. 368)

December 31, 1969. ABD wrote MOPAC expressing apprehension over the addition of the shoofly pier protection cells, advised that it was moving its forces on to the job site starting January 5, 1970, and warned that any delay in the commencement of the work would be expensive. (Exhibit 26)

January 5, 1970. ABD moved on the construction site to commence work. (Exhibit 54, Admission 101)

January 8, 1970. MOPAC informed ABD that the shoofly would not be operable until about the second week of February, 1970. (Exhibit 37)

February 14, 1970. Johnson completed the shoofly protection cells. (Young's diary, p. 409)

February 23, 1970. MOPAC completed removal of the rail from the Junction Bridge so that ABD could commence its work. (Exhibit 54, Admission 105)

October 23, 1970. MOPAC wrote ABD and granted a 175 day extension on the superstructure contract. (Exhibit 36) This letter states:

> "American Bridge's original construction schedule indicated site work to begin on September 1, 1969. Our records indicate that you were unable to proceed because of reasons stated in your letter until February 23, 1970. According to the calculations of our engineer, this resulted in an unavoidable delay on your part of 175 days . . . ."

The railroad acknowledged that 25 of the 175 days delay was attributable to MOPAC's own slowness in laying track on the shoofly and rerouting its traffic from the Junction Bridge to the shoofly.

REASONS FOR REFUSING THE WRIT

I.

THE EIGHTH CIRCUIT PROPERLY FOUND THAT MOPAC ACTIVELY INTERFERED.

The Eighth Circuit concluded that the term "active interference" implies the existence of some affirmative, willful act in bad faith which unreasonably interfers with the contractor's compliance with the terms of the construction contract. The Court recognized that the affirmative willful act of MOPAC was the issuance of the notice to proceed, and the requisite bad faith of the railroad was demonstrated by its knowledge that delay-causing circumstances existed which would likely cause ABD from timely proceeding with its work. (A-8)

The District Judge had found:

> "Until the notice to proceed was issued, ABD had free choice and complete flexibility to reschedule its orders and its work force. But it lost this freedom and flexibility when MOPAC issued the notice to proceed on November 22, 1968, at a time when Johnson had already encountered the unexpected rock ledge, redesigned its cofferdam, and found steel in the riverbed, all of which should have indicated to MOPAC that adjustment in schedules would be necessary because of the inevitable delay these changes would bring in the completion of the substructure work. The notice to proceed had a coercive and restricting effect upon ABD by virtue of the provisions of the contract." (A-20-21) * * *
>
> "ABD should not bear the cost of 150 day delay because it was MOPAC's active interference which prevented ABD from protecting its own interests as it could have done had it retained flexibility to schedule and had the other contractor proceeded with accurate specifications." (A-25)

The record is replete with circumstances which justify the decision of the District Judge which was affirmed by Circuit Judge Stevenson and Senior District Judge Henson. Rehearing was denied, Judge Arnold not participating.

That Al Johnson Company would not complete the shoofly on time was predestined when MOPAC issued its original design for the piles although it was aware that the river surface would never be less than one foot below the top of the piles while the work progressed. Only a drought of epic proportions would have saved the contractual timetable.

The discovery on August 17, 1968 of the rock ledge could only have meant delay, yet MOPAC later issued to ABD a notice to proceed rather than suspend the work under Article 35 of Section 1 of the contract. As a matter of fact, Johnson started work on the cellular cofferdam necessitated by the rock ledge on November 20, 1968, just two days before the notice to proceed was given to ABD. The cofferdam was not completed until July 29, 1969, nearly eight months later. In suggesting that the District Judge and the Eighth Circuit did not consider MOPAC's bad faith in their finding of active interference, MOPAC is not being realistic.

On October 28, 1968 Al Johnson Company encountered unexpected hard quartz and on October 30, 1968 Johnson struck steel in the riverbed—none of which had been warned of in the contractual documents. Twenty-five days later the notice to proceed was given to ABD.

After the notice to proceed was given, MOPAC's conduct was no less reprehensible. On March 17, 1969, four additional pier protection cells were proposed to be added to Johnson's shoofly construction contract. This proposal was approved on June 16, 1969 (six months before ABD was told). Yet, on July 2, 1969 MOPAC gave ABD a schedule showing that Johnson would complete the shoofly on December 31, 1969. Two more notices of slippage were later given, but the delay that was to be caused by the addition of the newly conceived pier

protection cells was never mentioned. On December 19, 1969 MOPAC finally got around to telling ABD that the cells had been added to Johnson's contract. Work did not begin on the new cells until January, 1970 and they were not completed until February 14, 1970. This was only nine days before MOPAC completed removal of the rail from the Junction Bridge so that ABD could commence its work. The delay caused by the addition of the cells was not the mere failure of the substructure contractor to complete its work on a specified date. This delay was caused by MOPAC's amendment of the substructure contract, long after giving ABD a notice to proceed.

II.

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING CERTIORARI AS REQUIRED BY RULE 17.

The decision below does not cast the slightest doubt on the validity of "no damages" clauses. Both the District Judge and the Eighth Circuit went out of their way to make it clear that such clauses, when clear and unambiguous, will be enforced according to their terms.

MOPAC lost the battle but won the war! The Court of Appeals said that active interference which is sufficient to overcome the effect of a no damage clause requires a finding that the contractor committed some affirmative, willful act in bad faith which unreasonably interfered with the contractor's compliance with the terms of the construction contract. The Court then affirmed the District Judge who had found such conduct on the part of the railroad.

MOPAC merely wants a remand which would require the District Judge to add the words "bad faith" to his finding that MOPAC was chargeable with active interference. The District Judge said that more was required than mere mistake or negligence.

The advise of Frankfurter, J., dissenting in *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 461; 79 S.Ct. 921; 3 L.Ed.2d 935 (1958) is applicable:

> "It is the staple business of Courts of Appeals to examine records for the sufficiency of evidence. To undertake an independent review of the review by the Court of Appeals of evidence is neither our function nor within our special aptitude through constant practice. Such disregard of sound judicial administration is emphasized by the fact that the judges of the Court of Appeals are, by the very nature of the business with which they deal, far more experienced than we in dealing with evidence, ascertaining the facts, and determining the sufficiency of evidence to go to a jury. If due regard be paid to the weighing of conflicting evidence and inferences drawn therefrom by these experienced judges, can it be fairly said that there was no reasoned justification for their conclusion and that their judgment was baseless? If not, we should leave undisturbed the judgment below. After all, we are reviewing the judgment of the Court of Appeals, and it is its judgment that must be subjected to the rule of reason."

CONCLUSION

The petition for a writ of certiorari should be denied. The finding of active interference on the part of the railroad is fully justified by the record. There is no special and important reason for granting a review on writ of certiorari.

Respectfully submitted,

PHILLIP CARROLL
ROSE LAW FIRM
120 East Fourth Street
Little Rock, Arkansas 72201
(501) 375-9131

Counsel for Respondent

July 13, 1982